

“Freedom of Information: More Than Just the FOIA”

Thank you very much, Gene, for that kind introduction.

I want to thank the First Amendment Center for inviting me here today. The Center's educational programs are informative and beneficial, and I congratulate you on your work. The Center has offices here in Washington, and in Nashville, just down the road a few hours from St. Louis. So we're practically neighbors.

Thank you to the Freedom Forum for hosting this important event at this impressive building. Thank you also to co-sponsors Sunshine Week, the American Library Association, Open the Government dot org and the Sunshine in Government Initiative. The Subcommittee has worked closely with both Open the Government and SGI and we thank them for their invaluable assistance.

I am pleased to be here today. Transparency and accountability are very important to me. Oversight of government activity – whether by Congressional committees, journalists, advocacy organizations, or an engaged public – depends upon freedom of information.

Of course, I know I'm preaching to the choir. Here today are some of the most knowledgeable experts on freedom of information in the country. You all understand the importance of transparency to the life of a democracy. All of us are committed to open government and to increasing transparency, and so I feel very much at home with you.

Since the Freedom of Information Act (FOIA) was passed in 1966, efforts to strengthen the statute and improve its administration have been crucial to making more government information publicly available. Last year, President Obama made it clear that executive branch agencies should administer the FOIA with the presumption of openness, cooperating with the public to respond to requests for information promptly.

However, FOIA is only one mechanism to ensure transparency and accountability. The government must establish a culture of openness, and act in affirmative ways to foster it. Creating a spirit of participation and collaboration between agencies and citizens requires more

action than simply being responsive.

Just answering FOIA requests – no matter how thoroughly and rapidly – does not fulfill the government's obligation to make information available. Agencies must be pro-active.

The title of this speech is "Freedom of Information: More Than Just the FOIA." And I believe that's true. But I think it's helpful to talk a little about the FOIA, since so much of our efforts, in Congress, the Administration and your advocacy, focus on the Act.

The FOIA isn't perfect. In the forty three years since the bill's enactment, Congress has continually re-examined and strengthened it. This reflects the changing nature of government information. But it also reflects the changing nature of the public's relationship with the government.

We want to know more about what the government knows and what it is doing. And we want to do more with the information that we seek. And the government is rapidly producing not only more information but in a growing variety of formats. So it makes sense that we re-visit the FOIA from time to time.

The issue, I think, is not just how we amend one federal statute. We need to look at freedom of information from a wider perspective. From the creation of a record, through its use by the agency, to its release and examination by the public, the principle of freedom of information applies. Freedom of information should be looked at as a complete lifecycle.

Transparency requires us to think about these issues from the very beginning, and not simply at the end; from the moment a record is first created, and not just later, when a requester seeks access. At several times in the lifecycle, agencies can – and, where appropriate, should – affirmatively disclose the information.

We also need to address the way government and the public collaborate to make information not only available but useful. It is the responsibility of government to be open and transparent. But I believe the people also have responsibilities. Fighting for a transparent government

requires action from those seeking the information.

An agency can release records, but can the public make use of them? There are many types – medical information, safety studies, educational materials, geographic and demographic data, nutritional guides – that the government can and should release in consumable formats, and not just raw data. We shouldn't have to rely on a third party for all of the information produced by the government to get into the hands of the public.

But I don't believe that government should be responsible for making every kind of information that it produces easily digestible by the general public. There is a place for individuals, advocacy groups, universities and businesses to take government data and produce reports, products, websites, and the like.

The Global Positioning System is a great example of government information used by businesses and the public in game-changing ways. The National Oceanic and Atmospheric Administration's environmental satellites, the Securities and Exchange Commission's filing database, EDGAR, and the Census Bureau's many products are just some of the hundreds of government data sets in use today. There is a need for a whole lot more.

A responsibility of both the people and the government is to work with each other on issues of access and accountability. So let me say to requesters: help agencies serve you the records that best meet your needs. Sometimes you know generally what you seek, but not which actual records fulfill your request. The agency relies on you to make your request in an understandable way. Be as specific as possible, and be willing to compromise.

To agencies, let me say: you generally know what information you have. FOIA officers, assist requesters to understand the scope and content of your records. They can't easily identify the records they need. Unlike with historical records in the National Archives, requesters don't have finding aids for your operational records. They need your assistance.

Be as open as possible, and willing to disclose. Follow the instructions from President Obama: release whatever you can that would not reasonably harm an interest protected by one of the statutory exemptions, or whose disclosure is not prohibited by law.

Working together, you can avoid the delays, misunderstandings and frustrations that can unfortunately characterize the FOIA process. You should both adopt the attitude of “help me help you.”

But, as I said, freedom of information is more than just the FOIA. It's also about affirmative disclosure. Agencies should not wait to be asked for information before they disclose it. This is clearly spelled out in the President's FOIA memorandum of January 21, 2009, when he wrote, “all agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.”

And this is detailed in Attorney General Holder's memorandum of March 19, 2009, when he advised that “agencies should readily and systematically post information online in advance of any public request.”

These changes are encouraging.

I am also encouraged by the President's Open Government Directive, especially the areas that address agency cultural changes. I look forward to seeing those changes implemented and start to have an effect.

Other important aspects of the President's Directive include:

- the pro-active release of high-value data sets;
- a required ten percent reduction of the FOIA backlog at each agency, each year;
- and the creation of an open government page on each agency's web site to allow for feedback and collaboration with the public.

Those of you who have been involved in these issues for some time know that each Administration has their own take on FOIA. Over time, this makes it difficult for agencies to apply FOIA consistently. In 1993, Attorney General Janet Reno issued a memorandum that adopted a new standard for openness. That memo overturned a 1981 rule encouraging agencies to withhold information if there was "a substantial legal basis" for doing so. The Reno memo applied a presumption of disclosure.

Eight years later, Attorney General John Ashcroft issued a memorandum reversing this presumption, and instead applied the "sound legal basis" standard for withholding information.

Almost exactly one year ago, Attorney General Holder restored the presumption of access and disclosure. We have to stop the pendulum from swinging back and forth, and look for ways to make this standard permanent.

I am very pleased that President Obama last year stood up the Office of Government Information Services. OGIS was created through the FOIA Amendments bill I introduced in the House that became the Open Government Act of 2007. I am happy that it is located at the National Archives, where it belongs, and is led by the eminently qualified Miriam Nisbet. OGIS' mediation and training efforts will have a positive impact not only on FOIA, but on open government at large. Agencies will learn better strategies of handling FOIA requests and serving requesters, and that will lead to more transparency and openness.

We have been talking with a lot of people and groups, and we're hearing some very good ideas – and we want to hear more, so please keep them coming. One we are examining is the creation of a federal FOIA database. It would provide information on each agency's FOIA process, including pending requests.

It would also detail the kinds of records that are being sought. Agencies are often asked by many different requesters for records from the same series. The agency should consider systematically processing the entire series, rather than have to continually respond to individual FOIA requests. This would save time and money, and result in a more comprehensive release of government information.

Of course, not everything within a particular series could be released affirmatively. But instead of processing hundreds of FOIA requests for the same series – the majority of which likely cover records that easily could be released – the agency would receive far fewer requests, and only for those records that legitimately require more thorough review.

Technology has the potential to dramatically change freedom of information. Agencies and the public should be thinking about and working towards that next game-changing government data set, that next G.P.S. system. And the one after that.

Agencies should create systems to receive FOIA requests electronically, automatically provide status updates, and produce the responses online.

When agencies post records released under FOIA on their websites, the information gets out not only to the requester, but to the public at large. These records, though, have to be posted in accessible formats. For example, the information has to be searchable. We shouldn't have to read through millions of pages manually just to find what we're looking for.

In addition, agencies should use technology to engage and collaborate with the public, such as those ideas that were included in the Open Government Directive.

Something else we will be looking at closely is the idea that "public means online." There are many examples of government information that has already been released, but is not really available in a meaningful way to a wide audience. It may be printed, or in electronic form but not online. The only way to access that information is to go to the agency itself and make your own copies.

For example, federal contractors and grantees who use federal funds to lobby the government have to disclose lobbying in connection with winning a contract or grant via the S.F.-L.L.L. form. These disclosure forms, which provide important data, are not available online.

If the government produces information that most of us can't access, that information really isn't public. Public means online.

I look forward to examining these issues, and more, in upcoming hearings. Our next oversight hearing is this Thursday, March 18, and is entitled “Administration of the Freedom of Information Act: Current Trends.” We will get a status report from government and non-governmental witnesses on the state of the FOIA. You are all invited to attend.

As you can see, freedom of information really is about more than just the FOIA. Creating a spirit of collaboration and a culture of openness requires us all to do our part. I am encouraged by the progress we are making, and eager to meet the challenges that lie ahead.

I want to close with three pieces of advice that apply to both agencies and those seeking information:

The Office of Government Information Services is an important addition to the open government community. However, OGIS is not designed to handle every FOIA request, or even every challenging one. I strongly recommend that the government and the public make every effort to resolve any outstanding issues before requesting the assistance of OGIS.

I also urge all parties to avoid hitting the “How dare they?!” button. During the FOIA process, there may be a point where a requester might think, “how dare they deny my request?” Or an agency might think, “how dare they refuse to limit the scope of their request?” Hitting this button can lead one or both sides to dig in and become intractable. That’s when things go off-course.

Finally, make sure you understand where the other person is coming from. Agencies, be certain you understand what you’re being asked for before you deny it.

And requesters, make sure you understand why the agency is doing something before you take things to the next level.

Reach out and try to understand each other. The end result could surprise you, and satisfy you, too. It could bring things to a successful conclusion earlier than you planned.

And speaking of bringing things to a successful conclusion – though not necessarily earlier than you planned – I want to thank you all for your attention today, and for your hard work on behalf of transparency. Your commitment to holding government accountable is exemplary, and critical to the health of our democracy.

Together, we can make sure that agencies take affirmative, practical steps to inform the public, in a timely manner, about what the government knows and what it is doing.

Thank you.